Supreme Court, U.S.
FILED
981400 NOV 5 - 1998
OFFICE OF THE CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1998

MELANIE ANN ROBINSON,

Petitioner

v

DEPARTMENT OF THE ARMY

Respondent

On review from the

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

William O. Kelly, Esq.
Attorney for Petitioner
3601 Smith Barry Rd., Suite 201
Arlington, Texas 76013
(817) 860-9929

24pp

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Court of Appeals' finding that the Petitioner's mental condition was adequately considered by the MSPB meets the substantial evidence standard.

II.

Whether the Court of Appeals erred in not holding that Petitioner's mental condition in 1996 so precluded her from voluntarily and knowingly entering into the settlement agreement rendering the agreement *void ab initio*.

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Opinion Below.	1
Statement of Jurisdiction	1
Relevant Constitutional, Statutory, and Related Provision	2
Statement of Case	3
Argument	5
Appendix	
Certificate of Service	

TABLE OF AUTHORITIES

CASES — Page

Coleson v. Inspector Gen'l. of Dept. Defense, 721 F Supp. 763 (E.D. Va. 1989) 8

Doyle v. Veterans Administration, 667 F.2d (Ct. Cl. 1981) 6

Fulgence v. J. Ray McDermott & Co., 662 F. 2d 1207 (5th Cir. 1981) 7

Jones v. Secretary, Dept. of Army, 912 F. Supp. 1397 (D. Kan. 1995) 6

Mararri v. WCI Steel, Inc., 130 F.3d 1180 (6th Cir. 1997) 7

Pugh v. Super Fresh Food Markets, Inc., 640 F. Supp. 1306 (E.D. Pa. 1986) 7

Zenith Radio Corp. v. Hazeltine Records, Inc., 401 U.S. 321 (1971) 7

Statute

5 U.S.C. Sec. 7701

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1998

MELANIE ANN ROBINSON,

Petitioner

v.

DEPARTMENT OF THE ARMY,

Respondent.

On review from the

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR CERTIORARI

Opinion Below

The opinion of the Court of Appeals for the Federal Circuit (App. A, infra pp A-1 to A-5).

Jurisdiction

The opinion of the United States Court of Appeals

for the Federal Circuit was issued on August 7, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

Statutory and Constitutional Provisions

The pertinent provision of the federal statute involved is set forth below:

> (c) In any case filed in the Unites States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--
>
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) obtained without procedures required by law, rule, or regulation having been followed; or
>
> (3) unsupported by substantial evidence; except that in the case of discrimination brought under any section referred to in subsection (b) (2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

5 U.S.C. Sec. 7703 (c)

Statement of the Case

This case involves the challenge of a decision of the Merit Systems Protection Board ("MSPB") to enforce a settlement agreement by Petitioner Melanie A. Robinson ("Ms. Robinson" or "Petitioner"). The Petitioner contended that due to her mental condition she was under duress at the time the settlement agreement was negotiated and executed.

On June 28, 1996, Ms. Robinson was removed from her position with the U.S. Corp. of Engineers, effective July 5, 1996, for failing to follow established leave procedures and for being absent without approved leave, although she had applied for leave under various employee programs and been denied. Petitioner appealed her removal from Federal employment to the MSPB on the grounds that the Corp of Engineers ("agency") had failed to grant her the leave that her mental condition required and therefore failed to make a reasonable accommodation.

Subsequently, Ms. Robinson retained attorney Jasper C. Rowe to represent her. A settlement agreement was entered by the agency's attorney and Ms. Robinson's attorney, Mr. Rowe. During this time, Ms. Robinson was under the care of a Psychiatrist and a Psychologist and taking medication for her mental and emotional condition.

The administrative Law Judge issued an Initial Decision on November 4, 1996, accepting the settlement agreement. The record indicates the Judge notified Ms. Robinson that the Initial Decision would become final unless she filed a petition for review on December 9, 1996. Although Ms. Robinson raised questions about whether a "secret settlement" had been reached between the agency and her representative concerning attorney fees, it does not appear she formally filed a petition for review prior to December 9, 1996. Again, during this period Ms. Robinson was on medication and under the care of her psychiatrist and psychologist. The Initial Decision became a final board decision.

When Ms. Robinson raised a issue regarding a dispute with her representative, in January 1997, the judge treated it as a petition for enforcement of the settlement. On March 31, 1997 the administrative law judge denied the petition for enforcement on the grounds that the agency had complied with the terms of the agreement, and determined the board lack authority to resolve the dispute between Ms. Robinson and Mr. Rowe, her attorney.

Ms. Robinson subsequently petitioned the board for

review of the petition for enforcement of the settlement in the Initial Decision and further requested that there be a reconsideration of the December 9,1996 decision to accept the settlement. She filed a motion on May 16, 1997 to have her submission accepted as timely or , in the alternative, to have the time limits waived. She cited as good cause her mental condition during the period she was to have appealed. The MSPB denied her petition on January 23, 1998.

On February 20, 1998, Ms. Robinson filed a timely appeal of the MSPB's decision to the United States Court of Appeals for the Federal Circuit. Both Ms. Robinson and the Department of the Army submitted informal briefs pursuant to the Rules of that Court. On August 7, 1998 that Court affirmed the MSPB's ruling. The mandate was issued on September 28, 1998. (App. B)

Argument

I

The Court of Appeal's finding that the Board adequately considered Petitioner's mental capacity at the time of the Settlement is not supported by substantial evidence.

The Court is empowered to set aside only those decisions made by the Merit System Protection Board which

are arbitrary, capricious, or unsupported by substantial evidence. Doyle v. Veterans Administration, 667 F. 2d 70, 71 (Ct. Cl. 1981) "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support the conclusion. Jones v. Secretary, Dept. of Army, 912 F Supp. 1397, 1413, (D. Kan. 1995).

In her petition seeking review of the Administrative Law Judge's decision, the Petitioner submitted evidence from her psychologist which substantiated her mental condition at the time of the 1996 settlement negotiations.(App. C) Evidence that Ms. Robinson raised the question of the "secret agreement" shortly after the settlement doesn't disprove her psychologist's opinion in this area. There was no substantial evidence to support the Court of Appeals on this issue. The fact that Ms. Robinson's underlying claim of disability was based on her mental condition does not prove that the administrative law judge made a determination of whether her mental condition impaired her ability to timely file a challenge to the settlement agreement.

II

It was error for the Court of Appeals to not hold that Petitioner's mental condition at the time of the settlement agreement rendered that agreement *void ab initio*.

When a release or settlement agreement impacts upon significant federal rights and interests, federal common law controls the interpretation of that particular release of release. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 343-48 (1971)

The only essential prerequisite for a valid agreement to settle is that the parties mutually assent to the terms and conditions of the agreement. Pugh v. Super Fresh Food Markets, Inc., 640 F Supp. 1306, 1308 (E.D. Pa 1986). Any settlement of federal statutory rights must be agreed to by the claimant voluntarily and knowingly. Mararri v. WCI Steel Inc., 130 F. 3d 1180, 1184 (6th Cir. 1997); Fulgence v. J. Ray McDermott & Co., 662 F. 2d 1207, 1209 (5th Cir. 1981)

Petitioner's position is that due to her mental condition in the fall of 1996 and the medication she was taking at the time her assent to the settlement could not have been made either voluntarily or knowingly. In the absence of such voluntary and knowing conduct on her part, the settlement agreement should not be held to be valid.

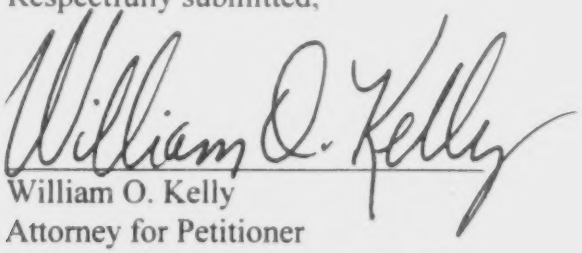
It has been held that a former federal employee's claim that he was "mentally exhausted at the time he entered into a settlement agreement with his former employer, was

insufficient to allow him to void the agreement. See Coleson v. Inspector Gen'l. of Dept. of Defense 721 F. Supp. 763, 769 (E.D. Va. 1989) This is not that case. Here the appellant presented documented , and uncontroverted, psychological evidence of her mental and emotional status at the time of the settlement. It was error for the Court of Appeals to have not found as a matter of law that the settlement agreement disputed here was neither voluntarily or knowingly made. The Petitioner's condition at the time of the agreement was not in position to have entered into the agreement.

Conclusion

This court should review this case because it represents a critical misapplication of the law in an area which potentially impacts thousands of federal employees. For these reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,



William O. Kelly
Attorney for Petitioner
3601 Smith Barry Road, Suite 201
Arlington, Texas 76013
(817) 860-9929
(817) 860-9565 FAX

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1998

MELANIE ANN ROBINSON,

Petitioner

v

DEPARTMENT OF THE ARMY

Respondent

On review from the

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITIONER'S APPENDIX

APPENDIX A

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

98-3167

MELANIE A. ROBINSON,
Petitioner,

v.

DEPARTMENT OF THE ARMY,
Respondent.

DECIDED: August 7, 1998

Before MICHEL, PLAGER, and CLEVENGER, Circuit Judges.

PER CURIAM.

DECISION

Ms. Melanie A. Robinson petitions for review of a decision of the Merit Systems Protection Board ("Board"), Docket No. DA-0752-96-0598-I-1. Ms. Robinson entered into a settlement agreement with the Department of the Army ("Army") after she appealed the Army's decision to remove her from service in 1996. The Board denied Ms. Robinson's untimely petition to review the initial decision which accepted the settlement agreement. Because the Board did not act

arbitrarily in concluding that petitioner filed late without good cause and failed to present new and material evidence warranting review. we affirm.

DISCUSSION

We have jurisdiction to hear this appeal under 28 U.S.C. Sec. 1295(a)(9) (1994). When reviewing a decision by the Board, we may reverse only if the decision was: arbitrary, capricious, and abuse of discretion, or unlawful; procedurally deficient; or unsupported by substantial evidence. See 5 U.S.C. Sec. 7703(c) (1994).

The settlement agreement at issue was entered to resolve Ms. Robinson's appeal following her removal from federal service due to extended absence without approved leave and for failing to follow established leave procedures. Ms. Robinson asserts that her absence was caused by a mental condition that was, at least partially, due to work-related stress. The agreement allowed Ms. Robinson to obtain disability retirement and have records of certain temporary suspensions removed form her file.

Ms. Robinson would like to have her settlement agreement set aside so she can pursue the appeal of her removal from federal service. She maintains that she would

not have entered the agreement had she not been suffering from various psychological ailments.

As an initial matter, Ms. Robinson did not timely petition the Board to review the initial decision which accepted the settlement agreement into the record for enforcement purposes. Instead, she later made a timely petition to the Board for review of the initial decision regarding compliance. At that time, however, she also requested that the Board review the initial decision accepting the agreement. With the petition, she submitted a motion to show "good cause" for the untimely filing. See 5 C.F.R. Sec. 1201.114(f) (1998). She asserted that because of her mental condition, she was unable to meet the earlier filing deadline, and attached a letter from her psychologist with a statement attesting to her mental condition. The Board declined to review the initial decision accepting the settlement agreement. The Board also denied the petition to review the settlement compliance decision, Docket No. DA-0752-96-0598-C-1; however, because Ms. Robinson does not address this decision on appeal, we do not review the Board's denial.

It is questionable whether Ms. Robinson's position, constitutes "good cause" for not timely filing the petition.

There is evidence in the record that only a few days after the settlement agreement was signed, she contacted the administrative law judge regarding a concern she had about the agreement, and she was reminded of the procedures and deadlines involved. At that point, she evidently understood enough to realize there may have been a problem, yet did not timely file a petition for review.

If we assume that she did timely file the petition and her submissions were accepted, we note that she faces a heavy burden in attacking the validity of the settlement agreement. She must prove that the agreement is invalid due to fraud, duress, or a mutual mistake. See Asberry v. United States Postal Serv., 692 F.2d 1378, 1380 (Fed. Cir. 1982). We do not believe she has met this burden of proof. The record shows that Ms. Robinson was aware of and understood the settlement agreement. In addition, since Ms. Robinson's mental condition was the basis for her appeal, the administrative law judge was well aware of her condition. Furthermore, there is no support in the record for the contention of Ms. Robinson's psychologist that it was not Ms. Robinson's choice to enter the agreement. Therefore, the information in the letter from Ms. Robinson's psychologist cannot be considered "new and material" evidence for

purposes of Board review. See 5 C.F.R. Sec. 1201.115 (1998) (Board may grant review if new and material evidence is available that, despite due diligence, was not available when the record closed.).

Finally, we also note that although Ms. Robinson may not have personally participated in the settlement, she is responsible for the actions of her representative. See Amin v. Merit System Protection Bd., 951 F.2d 1247, 1254 (Fed. Cir. 1991). If she is dissatisfied with her attorney's representation, there are alternate avenues for her to pursue. The Army, however, should not bear the responsibility for any alleged misconduct by Ms. Robinson's attorney.

Accordingly, the Board's decision is affirmed.

No costs.

APPENDIX B

United States Court of Appeals for the Federal Circuit

98-3167

MELANIE A. ROBINSON,
Petitioner,

v.

DEPARTMENT OF THE ARMY,
Respondent.

JUDGMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD

in CASE NO(S). DA0752960598-I-1

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED AUG 7 1998

/s/ Jan Horbaly
JAN HORBALY, CLERK

ISSUED AS A MANDATE: SEPTEMBER 28, 1998

APPENDIX C

James Cannici Ph.D.
Psychologist
1065 West Magnolia Ave.
Ft. Worth, Texas 76104
817-331-1379

April 30, 1997

The Clerk of the Board
Merit System Protection Board
1120 Vermont Ave., N.W. #802
Washington DC 20419

Dear Clerk:

This letter is in support of Melanie Robinson's contention that she entered into the settlement agreement (DA 072-96-0598-1-1) under duress. She has been a patient of mine since May 1996. I conducted a formal psychological evaluation of her and have been treating her with psychotherapy. Ms. Robinson suffers from severe Major Depression with psychotic features as well as a Conversion Disorder. Due to her mental condition, I attempted to convince her that it was in her best interest to agree to the settlement. I further shared this view with Mr. Jaspar Rowe and Judge Hugh Parker. Ms. Robinson, however, never consented to the settlement agreement. I was never her choice or wish.

If I can be of any further help, please do not hesitate to call.

/s/ James Cannici, Ph.D.

James Cannici, Ph.D.
Psychologist

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1998

MELANIE ANN ROBINSON,

Petitioner

v

DEPARTMENT OF THE ARMY

Respondent

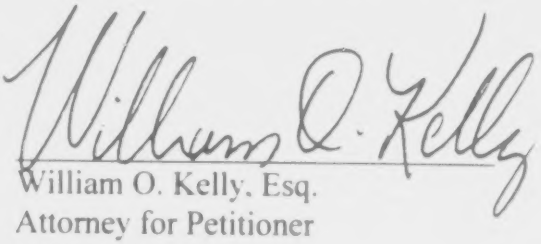
On review from the United States Court of Appeals
for the Federal Circuit

CERTIFICATE OF SERVICE

William O. Kelly
3601 Smith Barry Rd., Suite 201
Arlington, Texas 76013
(817) 860-9929

CERTIFICATE OF SERVICE

I hereby certify that I have deposited in the U.S. mails, postage prepaid, three copies of the above attached Petition for Writ of Certiorari to the Solicitor General of the United States, Room 5614, Department of Justice 10th St. and Constitution Ave., N.W. Washington, D.C. 20530 on this 8th day of January 1999.



William O. Kelly, Esq.
Attorney for Petitioner
Melanie A. Robinson